**Four Seasons Healthcare & Wellness Center, LP, A California Limited Partnership *and* Ana Cruz.**
Case 31–CA–169143

August 13, 2020

SUPPLEMENTAL DECISION AND ORDER

BY CHAIRMAN RING AND MEMBERS KAPLAN AND EMANUEL

On June 21, 2017, Administrative Law Judge Ariel L. Sotolongo issued the attached decision, and on September 20, 2017, he issued an Errata. The Respondent filed exceptions and a supporting brief, and the General Counsel filed an answering brief.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings, and conclusions only to the extent consistent with this Supplemental Decision and Order.

## I. BACKGROUND

The Respondent operates a skilled nursing facility. At all material times since July 1, 2011, the Respondent has maintained a two-page "AGREEMENT TO BE BOUND BY ALTERNATIVE DISPUTE RESOLUTION POLICY" (Agreement), with an attached three-page "ALTERNATIVE DISPUTE RESOLUTION POLICY" (Policy). The Agreement and the Policy require the arbitration of employment-related disputes. Also, since about July 1, 2011, the Respondent has required some employees, including the Charging Party, to sign the Agreement as a condition of employment.

In relevant part, the Agreement states:

> I agree that in the event employment disputes arise between Four Seasons Healthcare and Wellness Center (herein referred to as the "Company"), on the one hand, and me, on the other hand, I will be bound by the Company ADR Program, which provides for final and binding arbitration.
>
> This ADR Program is understood to apply to all disputes relating to my employment . . . .
>
> . . . .
>
> I also acknowledge and agree that employment disputes arising out of or related to my employment, the terms and conditions of my employment, and the termination of my employment, all of which are also subject to the ADR Program, include, but are not limited to…. alleged violations of federal, state and/or local constitutions, statutes or regulations . . . .
>
> . . . .
>
> IT IS AGREED THAT THE ALTERNATIVE DISPUTE RESOLUTION POLICY ATTACHED HERETO WHICH PROVIDES FOR FINAL AND BINDING ARBITRATION, IS THE EXCLUSIVE MEANS FOR RESOLVING COVERED DISPUTES; NO OTHER ACTION MAY BE BROUGHT IN COURT OR IN ANY OTHER FORUM. I UNDERSTAND THAT THIS AGREEMENT IS A WAIVER OF ALL RIGHTS TO A CIVIL COURT ACTION FOR ALL DISPUTES RELATING TO MY EMPLOYMENT, THE TERMS AND CONDITIONS OF MY EMPLOYMENT AND/OR THE TERMINATION OF MY EMPLOYMENT WHETHER BROUGHT BY ME OR THE COMPANY; ONLY AN ARBITRATOR, NOT A JUDGE OR JURY, WILL DECIDE THE DISPUTE. IN ADDITION, I UNDERSTAND I AM PROHIBITED FROM JOINING OR PARTICIPATING IN A CLASS ACTION OR REPRESENTATIVE ACTION, ACTING AS A PRIVATE ATTORNEY GENERAL OR REPRESENTATIVE OF OTHERS, OR OTHERWISE CONSOLIDATING A COVERED CLAIM WITH THE CLAIMS OF OTHERS.

In the final paragraph, just above the signature line, the Agreement states:

> I also acknowledge and agree that nothing in this ADR Policy shall be construed as precluding any employee from filing a charge with a state or federal administrative agency, such as the U.S. Equal Employment Opportunity Commission ("EEOC") or the National Labor Relations Board. A state or federal administrative agency would also be free to pursue any appropriate action. However, any claim that is not resolved administratively through such an agency shall be subject to this agreement to arbitrate and the ADR Policy.

As noted, the Agreement was accompanied by a copy of the Respondent's Policy, which provided additional information on the details of the arbitration program. The Policy states, in relevant part:

> **WHO IS COVERED BY THE ADR POLICY**
>
> The ADR Policy will be mandatory for ALL DISPUTES ARISING BETWEEN EMPLOYEES AND THE COMPANY.

. . . .

**COVERED DISPUTES**

. . . .

Covered disputes include any dispute arising out of or related to my employment, the terms and conditions of my employment and/or the termination of my employment but not limited to, the following:

- Alleged violations of federal, state and/or local constitutions, statutes or regulations[;]
- Claims of unlawful harassment, discrimination, retaliation or wrongful termination that cannot be resolved by the parties or during an investigation by an administrative agency . . . .
- Claims of unfair demotion, transfer, reduction in pay, or any other change in the terms and conditions of employment;

. . . .

- Claims of defamation, pre and post-termination.

. . . .

The following types of disputes are expressly excluded and are not covered by this ADR Policy:

- Disputes related to workers' compensation and unemployment insurance; Disputes or claims that are expressly excluded by statute or are expressly required to be arbitrated under a different procedure pursuant to the terms of a team member benefit plan.

. . . .

**SEVERABILITY**

. . . .

Nothing in this Alternative Dispute Policy is intended to preclude any employee from filing a charge with the Equal Employment Opportunity Commission, the National Labor Relations Board or any similar federal or state agency seeking administrative resolution. However, any claim that cannot be resolved through administrative proceedings shall be subject to the procedures of this ADR policy.

Applying the "reasonably construe" prong of *Lutheran Heritage Village-Livonia*, 343 NLRB 646, 647 (2004), the judge found that the Respondent's maintenance of the Agreement and the Policy violated Section 8(a)(1) because employees would reasonably construe the documents as restricting their right to file unfair labor practice charges with the Board. In so finding, the judge observed that language regarding the mandatory arbitration requirement dominated the Agreement and the Policy—appearing in bold, capitalized letters in some portions—whereas the savings language was "buried toward the end of both documents[.]"[1] In these circumstances, the judge, citing *Lincoln Eastern Management Corp.*, 364 NLRB No. 16 (2016), and *Ralph's Grocery Co.*, 363 NLRB No. 128 (2016), concluded that because the scope of the mandatory arbitration requirement "overwhelm[ed] the arguably mitigating effect" of the savings language in the Agreement and the Policy, the savings language in those documents was, in effect, "illusory."

After the judge issued his decision, the Board overruled the "reasonably construe" prong of *Lutheran Heritage* in *Boeing Co.*, 365 NLRB No. 154 (2017), announcing a new standard for evaluating the lawfulness of facially neutral rules and policies, and decided to apply the new standard retroactively to all pending cases.[2]

On November 21, 2019, the Board issued a Decision, Order, and Notice to Show Cause in this case. Applying the Supreme Court's decision in *Epic Systems Corp. v. Lewis*, 584 U.S. __, 138 S. Ct. 1612 (2018), the Board reversed the judge, in part, and dismissed the allegation that the Respondent violated Section 8(a)(1) by maintaining and enforcing the Agreement and the Policy because they require employees, as a condition of employment, to waive their rights to pursue class or collective actions involving employment-related claims in all forums, whether arbitral or judicial. The Board also severed the complaint allegation that the Agreement and the Policy independently violated Section 8(a)(1) because they would reasonably be construed by employees to restrict their right to file unfair labor practice charges with the Board, and issued a Notice to Show Cause why the severed

[1] By "savings language," we mean language in an arbitration agreement providing that employees "retain the right to file charges with the Board, even if the agreement otherwise includes claims arising under the Act within its scope." *Everglades College, Inc. d/b/a Keiser University*, 368 NLRB No. 123, slip op. at 3 fn. 3 (2019).

[2] Under *Boeing*, the Board first determines whether a challenged rule or policy, reasonably interpreted, would potentially interfere with the exercise of rights under Sec. 7 of the Act. If not, the rule or policy is lawful. If so, the Board determines whether an employer violates Sec. 8(a)(1) of the Act by maintaining the rule or policy by evaluating two things: "(i) the nature and extent of the potential impact on NLRA rights, and (ii) legitimate justifications associated with the rule." *Boeing*, slip op. at 3 (emphasis omitted). In conducting this evaluation, the Board will strike a proper balance between the asserted business justifications and the invasion of employee rights in light of the Act and its policies, viewing the rule or policy from the employees' perspective. Id.

allegation should not be remanded to the judge for further proceedings in light of *Boeing*.

In response to the Notice to Show Cause, the General Counsel opposed remand and argued that the Agreement and the Policy were lawful under *Boeing* because the savings clauses were clear, unequivocal, and sufficiently prominent so that employees would not reasonably interpret the Agreement and the Policy to restrict their access to the Board.[3] In view of the General Counsel's response, and because the only issue in this case is the facial lawfulness of the Agreement and the Policy, which are already part of the record before us, we agree that a remand is unnecessary and, for the reasons explained below, find that the Agreement and the Policy are lawful.

## II. DISCUSSION

Unlike the judge, we find that the Agreement and the Policy, when reasonably interpreted, do not interfere with employees' right to file Board charges and participate in Board proceedings.

In *Prime Healthcare Paradise Valley, LLC*, we held that "an arbitration agreement that explicitly prohibits the filing of claims with the Board or, more generally, with administrative agencies must be found unlawful" because "[s]uch an agreement constitutes an explicit prohibition on the exercise of employee rights under the Act." 368 NLRB No. 10, slip op. at 5 (2019). Where an arbitration agreement does not contain such an explicit prohibition but rather is facially neutral, the standard set forth in *Boeing* applies. Id. Under that standard, the Board determines whether the arbitration agreement at issue, "'when reasonably interpreted, would potentially interfere with the exercise of NLRA rights.'" Id. (quoting *Boeing*, supra, slip op. at 3).[4] The "when reasonably interpreted" standard is an objective one and looks solely to the wording of the rule, policy, or other provision at issue interpreted from the perspective of an objectively reasonable employee, who does not view every employer policy through the prism of the NLRA. See *LA Specialty Produce Co.*, 368 NLRB No. 93, slip op. at 2 (2019).

Recently, in *Anderson Enterprises, Inc. d/b/a Royal Motor Sales*, we addressed the lawfulness of an employer policy that both required employees to arbitrate all employment-related disputes and also included savings language expressly informing employees that they are free to file charges with the Board. 369 NLRB No. 70 (2020). The policy's savings clause in that case provided that "[c]laims may be brought before an administrative agency but only to the extent applicable law permits access to such an agency notwithstanding the existence of an agreement to arbitrate. Such administrative claims include without limitation claims or charges brought before . . . the National Labor Relations Board." Id., slip op. at 1. We found that this savings clause rendered the arbitration policy lawful. To begin, the savings clause was sufficiently prominent within the policy; it immediately followed the sentence providing for arbitration of "any" claims. Id., slip op. at 3. Further, the savings clause specifically and affirmatively stated that employees may bring claims and charges before the Board.

Here, the Agreement and the Policy require arbitration of all employment-related disputes, which would include claims arising under the Act. However, like the savings clause in *Anderson Enterprises*, the savings clauses in the Agreement and the Policy make clear that employees retain the right to file unfair labor practice charges with the Board. Specifically, the Agreement states that nothing therein "preclud[es] any employee from filing a charge with a state or federal administrative agency, such as … the National Labor Relations Board," and it further states that the agency is free to pursue any appropriate action. Likewise, the Policy states that it is not "intended to preclude any employee from filing a charge with the . . . the National Labor Relations Board[.]"[5] Moreover, we find that the savings language in the Agreement and in the Policy is sufficiently prominent. Both of the documents are short—two and three pages, respectively—and the savings clauses are clearly set forth in free-standing paragraphs. Indeed, the savings clause in the Agreement is located immediately above the employee's signature line – a location that would not be easily overlooked or disregarded by employees.

Relying on *Lincoln Eastern Management Corp.*, supra, and *Ralph's Grocery*, supra, the judge found the Agreement and the Policy to be unlawful due to the "sweeping" language of the mandatory arbitration requirement and the fact that the "nominal mention" of employees' right to file Board charges was "buried" at the end of the documents. We disagree. As an initial matter, the Board recently overruled, in relevant part, the cases that the judge relied on in

[3] No other party filed a response to the Notice to Show Cause.

[4] A challenged rule may not be found unlawful merely because it could be interpreted, under some hypothetical scenario, as potentially limiting some type of Sec. 7 activity or because the employer failed to eliminate all ambiguities from the rule. See *Boeing*, supra, slip op. at 9.

[5] We note that a savings clause in an arbitration agreement may sufficiently preserve employees' right to file charges with the Board even if it does not expressly refer to the National Labor Relations Board, the NLRB, or the Board. See *Hobby Lobby Stores, Inc.*, 369 NLRB No. 129, slip op. at 3 (2020) (finding legally sufficient to preserve employees' right of access to the Board savings-clause language stating that employees who sign arbitration agreement "are not giving up . . . the right to file claims with federal . . . government agencies"). Necessarily, then, there can be no question of the legal sufficiency of a savings clause like the one at issue here, which expressly and prominently refers to employees' right to file charges with the National Labor Relations Board.

finding the Agreement and the Policy unlawful. See *Anderson Enterprises*, supra, slip op. at 4–5. Moreover, we do not share the judge's view that the savings language was ineffective because it was "buried" at the end of the policy. To the contrary, the Board has recently recognized that the placement of a savings clause at the end of the document "enhances rather than detracts from its conspicuousness: it is literally the last word in the Policy." *San Rafael Healthcare and Wellness, LLC*, 369 NLRB No. 105, slip op. at 3 (2020).

For these reasons, we find that employees would not reasonably interpret the Respondent's Agreement and Policy as potentially interfering with their right of access to the Board and its processes. Accordingly, we will dismiss the complaint.

ORDER

The complaint is dismissed.

Dated, Washington, D.C. August 13, 2020

John F. Ring, Chairman

Marvin E. Kaplan, Member

William J. Emanuel, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

*Nicholas Gordon, Esq.,* for the General Counsel.
*Kamran Mirrafati, Esq. (Foley & Lardner LLP),* for the Respondent.

DECISION

STATEMENT OF THE CASE

ARIEL L. SOTOLONGO, Administrative Law Judge. This case is before me based on a stipulated record, pursuant to a joint motion submitted by the parties on January 3, 2017, which I approved on January 9, 2017. At issue is whether Four Seasons Healthcare & Wellness Center, LP, a California Limited Partnership (Respondent or Employer) violated the Act by maintaining and enforcing an arbitration policy and agreement compelling its employees to forgo class actions and submit employment-related disputes to arbitration. The issues presented in this case thus fall squarely within the preview of the Board's doctrine first announced in *D. R. Horton, Inc.*, 357 NLRB 2277 (2012), enf. denied in relevant part, 737 F.3d 344 (5th Cir. 2013), and further expanded upon in *Murphy Oil USA, Inc.*, 361 NLRB 774 (2014), enf. denied 808 F.3d 1013 (5th Cir. 2015), cert. granted 137 S. Ct. 809 (2017). As indicated by the citation in *Murphy Oil*, these issues are currently pending before the Supreme Court in light of a split between the circuit courts on these matters.[1] The Supreme Court's ultimate decision, it is anticipated, will finally help resolve numerous cases presently pending before the Board and the courts on these issues. Until then, I am compelled to Board precedent on these matters, as discussed below.

I. JURISDICTION

In their joint motion (JM), which I approved and granted, the parties agreed to the following jurisdictional facts and conclusions:

At all material times, Respondent has been a Limited Partnership with an office and place of business in North Hollywood, California (the facility), where it is engaged in the operation of a skilled nurse facility providing rehabilitation services for the elderly. In conducting its business operations at the facility during the last 12 months, Respondent derived gross revenues in excess of $100,000, and during the 12-month period ending on May 31, 2016, Respondent purchased and received at the facility good and services valued in excess of $5000 directly from points outside the State of California.

Accordingly, the parties agreed, and I conclude, that at all material times, Respondent has been an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.[2]

II. FACTS

In the JM, the parties stipulated to the following facts, as enumerated below:

> 1. Since at least about July 1, 2011, and at all materials times, Respondent has maintained a Policy and Agreement, which, if signed by employees, apply to "all disputes relating to [their] employment" as defined in the Policy and prohibits them from "joining or participating in a class action or representative action, acting as a private attorney general or representative of others, or otherwise consolidating a covered claim with the claims of others." (JM, ¶ 14—and Jt. Exhs. 1–2.)
>
> The Policy reads in relevant part:
>
> **WHO IS COVERED BY THE ADR POLICY:** the ADR Policy will be mandatory for ALL DISPUTES ARISING BETWEEN EMPLOYEES AND THE COMPANY.
>
> **COVERED DISPUTES:** Covered disputes include any dispute arising out of or related to my employment, the terms and conditions of my employment and/or the termination of my employment but not limited to, the following:

[1] See also *Lewis v. Epic Systems Corp.*, 823 F.3d 1147 (7th Cir. 2016), cert. granted 137 U.S. 809 (2017).

[2] In the JM, the parties also agreed to several procedural facts and matters, such as the dates of the filing and service of the initial charge and amended charges, as well as the dates of the issuance of the complaint and the filing of the answer thereto.

- Claims of unlawful harassment, discrimination, retaliation or wrongful termination that cannot be resolved by the parties or during an investigation by an administrative agency…
- Claims alleging failure to compensate for all hours worked, failure to pay overtime, failure to pay minimum wage, failure to reimburse expenses, failure to pay wages upon termination, failure to provide accurate, itemized wage statements, failure to provide meal and/or breaks, entitlement to waiting time penalties and/or other claims involving employee wages, including, but not limited to claims brought under the California Labor Code, the applicable wage order, the Fair Labor Standards Act and any other statutory scheme…

The following types of disputes are expressly excluded and are not covered by this ADR policy:

- Disputes or claims that are expressly excluded by statute or are expressly required to be arbitrated under a different procedure pursuant to the terms of a team member benefit plan.

**CLASS ACTION WAIVER:** I understand and agree this ADR program prohibits me from joining or participating in a class action or representative action, acting as a private attorney general or representative of others, or otherwise consolidating a covered claim with the claims of others. (Jt. Exh. 1 pp. 1–2.)

Furthermore, the *Agreement* reads in relevant part:

> This ADR program is understood to apply to all disputes relating to my employment, the terms and conditions of my employment, including but not limited to my compensation, wages, claims alleging failure to compensate for all hours worked, failure to pay overtime, failure to pay minimum wage, failure to reimburse expenses, failure to pay wages upon termination, failure to provide accurate, itemized wage statements, failure to provide meal and/or breaks, entitlement to waiting time penalties and/or other claims involving employee wages, benefits, discipline, performance evaluations, promotions and transfers, and the termination of my employment, as defined in the ADR Program materials. I agree this ADR Program prohibits me from joining or participating in a class action or representative action, acting as a private attorney general or representative of others, or otherwise consolidating a covered claim with the claims of others…
>
> I UNDERSTAND THAT THIS AGREEMENT IS A WAIVER OF ALL RIGHTS TO A CIVIL COURT ACTION FOR ALL DISPUTES RELATING TO MY EMPLOYMENT, THE TERMS AND CONIDTION OF MY EMPLOYMENT AND/OR THE TERMINATION OF MY EMPLOYMENT WHETHER BROUGHT BY ME OR THE COMPANY; ONLY AN ARBITRATOR, NOT A JUDGE OR JURY, WILL DECIDE THE DISPUTE. IN ADDITION, I UNDERSTAND I AM PROHIBITED FROM JOINING OR PARTICIPATING IN A CLASS ACTION OR REPRESENTATIVE ACTION, ACTING AS A PRIVATE ATTORNEY GENERAL OR REPRESENTATIVE OF OTHERS, OR OTHERWISE CONSOLIDATING A COVERED CLAIM WITH THE CLAIMS OF OTHERS…
>
> I also acknowledge and agree that nothing in this ADR policy shall be construed as precluding any employee from filing a charge with a state or federal administrative agency, such as the US Equal Employment Opportunity Commission ("EEOC") or the National Labor Relations Board… (Jt. Exh. 2 pp. 1–2.)[3]

2. Since about July 1, 2011, and at all material times, Respondent has required employees, including Cruz, to sign the Agreement as a condition of employment. (JM, ¶ 15.)[4]

3. Since about July 1, 2011, and at all material times, Respondent has required employees, including Cruz, to sign the Agreement as a condition of employment. (JM, ¶ 15.)

4. On or about November 6, 2015, Respondent filed a notice of motion and motion to compel arbitration, dismiss plaintiffs class claims, and request for stay of proceedings in accordance with the terms of the Agreement and Policy in the Superior Court of the State of California, County of Los Angeles, in Case No. BC588960 (State Court Action). (JM, ¶ 16(a).)[5]

5. Respondent's motion to compel moved the California State Court to require Cruz to submit the entirety of her State Court Action to binding arbitration pursuant to the terms of Respondent's Agreement and Policy. (Jt. Exh. 3, p. 2.)

6. On or about December 11, 2015, Respondent filed an amended notice of motion and motion to compel arbitration, dismiss plaintiff's class claims, and request for stay of proceedings in accordance with the terms of the Agreement and policy in the State Court action. (JM, ¶ 16(b).)

7. Respondent's amended motion to compel again moved the State Court to require Cruz to submit the entirety of her State Court action to binding arbitration pursuant to the terms of Respondent's Agreement and Policy.

8. On or about January 15, 2016, Respondent filed a reply to Plaintiff's opposition to Defendant's motion to compel arbitration, dismiss claims, and request for stay of proceedings. (JM, ¶ 16(c).)

9. Respondent's reply to plaintiff's opposition requested that the State Court grant Respondent's motion to compel

[3] Additionally, the final paragraph of the Policy, under a heading entitled "Severability," contains the following language: "Nothing in this Alternative Dispute Policy is intended to preclude any employee from filing a charge with…the National Labor Relations Board or any similar federal or state agency seeking administrative resolution. However, any claim that cannot be resolved through administrative proceedings shall be subject the procedures of this ADR policy." (Jt. Exh. 1 pp. 1–3.)

[4] "Cruz" refers to Ana Cruz, an employee of Respondent and Charging Party in this case.

[5] Cruz had filed a class-action complaint in state court on or about July 22, 2015, against Respondent (and apparently affiliated entities) on behalf of herself and other similarly situated individuals for alleged violations related to rest periods, overtime, and minimum wages, etc. (See GC Exh. 1(f).) Curiously, this underlying fact was left out of the stipulation, but is clearly undisputed inasmuch it was the basis for Respondent's filing in state court to enforce the mandatory arbitration agreement, which is admitted.

arbitration.

10, On or about January 25, 2016, the Honorable Elihu M. Berle of the Los Angeles Superior Court granted Respondent's motion to compel arbitration pursuant to the terms of the agreement and policy noted therein. (JM, ¶ 16(d).)

In accordance to the above stipulated facts, the parties in the JM agreed that this case presented the following issues:

(1) Whether Respondent violated Section 8(a)(1) of the Act by maintaining a mandatory arbitration policy which requires employees to resolve employment-related disputes exclusively through individual arbitration proceedings and to relinquish any right they have to resolve such disputes through collective or class action.

(2) Whether Respondent violated section 8(a)(1) of the Act by enforcing the Policy and Agreement when it relied upon them in support of its motion to compel arbitration in response to class action litigation.

(3) Whether Respondent violated Section 8(a)(1) of the Act by maintaining a mandatory arbitration policy that employees reasonably would believe precludes them from or restricts them in filing unfair labor practice charges with the National Labor Relations Board.

The above-described facts are the relevant facts agreed upon by the parties in their stipulation.

## III. DISCUSSION AND ANALYSIS

As briefly mentioned in the preamble, the facts and issues of this case fall within and are governed by the Board's decisions in *D. R. Horton* and *Murphy Oil*, and numerous subsequent cases where the Board affirmed the doctrine espoused in those two cases.

With regard to the first and second issues enumerated above, I note that as described in the factual stipulation above (JM ¶ 1), Respondent's "Alternate Resolution Policy" (Policy) and the accompanying "Agreement To Be Bound By Alternative Dispute Resolution Policy" (Agreement), clearly requires employees to forgo collective claims of any type in both arbitral and judicial forums, including class actions or representative actions, and to submit employment-related disputes to arbitration. Additionally, as described in the factual stipulation (JM, ¶ 2), it is clear that employees are required, as a condition of employment, to sign the Agreement and follow the Policy, the relevant portions of which are posted above, and thus to be bound to their terms. It is by now well-established Board policy pursuant to *D. R. Horton* and *Murphy Oil*, as well as many subsequent cases, that any policies that bind or force employees to pursue individual arbitration in employment-related disputes in lieu of other forms of collective actions or remedies violate Section 8(a)(1) of the Act. See, e.g., *Century Fast Foods, Inc.*, 363 NLRB No. 97 (2016); *Fuji Food Products*, 363 NLRB No. 118 (2016); *Haynes Bldg., Services, LLC*, 363 NLRB No. 125 (2016). I find it unnecessary to rehash the Board's rationale in support of such doctrine, for the Board has by now explained its reasons in exquisite detail not only in *D. R. Horton* and *Murphy Oil*, but in many subsequent cases as well. Although some Courts of Appeal have disagreed with the Board on this issue and refused to enforce its orders, as pointed out by Respondent on brief, other Courts of Appeal have agreed with the Board's view—including one just in the last few days.[6] As discussed in the preamble, this issue is now pending before the Supreme Court. In the meantime, I am bound to follow Board precedent, not that of circuit courts which disagree with the Board. *Pathmark Stores*, 342 NLRB 378 fn. 1 (2004); *Waco, Inc.*, 273 NLRB 746, 749 fn. 14 (1984). Accordingly, by maintaining and implementing such policies, as reflected in the Policy and Agreement, Respondent has violated Section 8(a)(1) of the Act. Likewise, by filing a court action—and obtaining a judgment—to enforce such Policy and Agreement, as Respondent admitted (in the stipulated facts) it did against employee Cruz, Respondent also violated Section 8(a)(1) of the Act. *Century Fast Foods*, supra; *Countrywide Financial Corp.*, 362 NLRB 1331, 1333 (2015).

The final issue posed by the instant case (issue No. 3, above), as agreed upon by the parties, is whether under the present circumstances, employees would reasonably believe that the Policy and Agreement would preclude them from or restrict them in filing charges with the Board. If so, under the Board's ruling in *Ralph's Grocery Co.*, 363 NLRB No. 128, slip op. 1 (2016), applying the earlier doctrine announced by the Board in *Lutheran Heritage Village-Livonia*, 343 NLRB 646, 646–647 (2004), Respondent would violate Section 8(a)(1) of the Act.[7] The Agreement contains language commonly referred to as a "savings clause," which, at first glance, would appear to preserve an employee's right to file charges with the Board (or other Federal or State agencies), notwithstanding the other provisions in the Agreement. Indeed, as described in the agreed-upon facts, such language appears in two places, once in the Agreement and once in the Policy.

Despite the existence of similarly-worded or almost identical "savings clauses" in other cases, however, the Board has nonetheless ruled that those clauses do not "save" the employer from violating Section 8(a)(1) of the Act, if the scope or reach of the mandatory arbitration language is such that it overwhelms the arguably mitigating effect of the savings clause. See *Ralph's Grocery Co.*, supra; *Lincoln Eastern Management*, 364 NLRB No. 16, slip op. 2–3 (2016). Such is the case in the present situation. The language of the Policy, and particularly the Agreement, is sweeping in its breadth, stating in bold, capitalized letters that it constitutes "A WAIVER OF ALL RIGHTS TO A CIVIL COURT ACTION FOR ALL DISPUTES RELATED TO MY EMPLOYMENT . . . ONLY AN ARBITRATOR, NOT A JUDGE OR A JURY, WILL DECIDE THE DISPUTE . . . " (underlined emphasis supplied). I additionally note that language

[6] Thus, the 5th and 8th circuit courts have disagreed with the Board. See *Murphy Oil USA, Inc. v. NLRB*, 808 F.3d 1013, 1018 (5th Cir. 20160; *Cellular Sales of Mo., LLC v. NLRB*, 824 F.3d 1050 (8th Cir. 2016). The 9th, 7th, and most recently, the 6th circuits have agreed with the Board's position. See *Morris v. Ernst & Young, LLP*, 834 F.3d 975, 985–986 (9th Cir. 2016); *Lewis v. Epic Sys. Corp.*, 823 F.3d 1147, 1160 (7th Cir. 2016); *NLRB v. Alternative Entertainment, Inc.*, No. 16-1385 (6th Cir. May 26, 2017).

[7] See also, *U-Haul of California*, 347 NLRB 375, 377–378 (2006), enfd. 255 Fed.Appx. 527 (D.C. Cir. 2007).

similar to the one immediately cited above, albeit in regular-sized letters, dominates and commands the vast majority of the text in the Agreement and Policy, while the "savings clauses," buried toward the end of both documents, constitute but a small fraction of the over-all text in these documents. At minimum, the conflicting messages represent an ambiguity that "must be construed against Respondent as the promulgator of the rule." *Amex Card Services Co.*, 363 NLRB No. 40, slip op. at 2–3 (2015), citing *Lafayette Park Hotel*, 326 NLRB 824, 828 (1998). This is particularly so in light of the Board's view that "rank and file employees…cannot be expected to have the expertise to examine company rules from the legal standpoint." *Ralphs Grocery Co.,* supra, slip op. at 1, quoting *Solar City*, 363 NLRB No. 83, slip op at 5 (2015), in turn quoting from *Ingram Book Co.*, 315 NLRB 515, 516 (1994). Accordingly, I conclude, as the Board did in *Ralphs Grocery Co.*, that the Policy and Agreement's nominal mention of employees' right to file Board charges is illusory. Thus, in the context of the sweeping over-all language in the Policy and Agreement, I find that employees would reasonably feel inhibited from filing Board charges, and that such Policy and Agreement also violate Section 8(a)(1) of the Act for this additional reason.

## CONCLUSIONS OF LAW

1. Respondent at all times material herein has been an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. Respondent violated Section 8(a)(1) of the Act by maintaining and enforcing a mandatory arbitration agreement (Agreement and Policy) that mandates individual arbitration and precludes class actions by employees for employment-related claims in any forum, arbitral, or judicial.

3. Respondent violated Section 8(a)(1) of the Act by filing a notice of motion and motion to compel arbitration, dismiss plaintiffs class claims, and request for stay of proceedings in accordance with the terms of the Agreement and Policy in the Superior Court of the State of California, County of Los Angeles, in Case No. BC588960.

4. Respondent violated Section 8(a)(1) of the Act by maintaining and enforcing a mandatory arbitration agreement that employees could reasonably construe to preclude filing of charges with the Board.

## REMEDY

Having found that Respondent has engaged in certain unfair labor practices, I shall order it to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act.

As I have concluded that the Agreement and Policy is unlawful, Respondent must revise or rescind the Agreement and Policy and advise their employees in writing that the Agreement and Policy has been revised or rescinded. Further, Respondent shall post notices in all locations where the Agreement and Policy was in effect informing employees of the revision or rescission of the Agreement and Policy, and shall provide said employees with a copy of any such revised documents. Any revision should clarify that such agreement does not bar or restrict employees from seeking class wage and hour actions or any other type of class employment-related actions in any forum, and specifically does not bar or restrict employees from filing charges with the NLRB.

Respondent shall further be ordered to notify the State Court in Case No. BC588960 that it no longer opposes the plaintiff's claims on the basis of the Agreement and Policy, which has been rescinded or revised because it was found unlawful, and to move the court to vacate its order compelling individual arbitration on the basis of the Agreement and Policy.[8] Respondent shall also be ordered to reimburse Charging Party Cruz for all reasonable expenses and legal fees, with interest, incurred in opposing Respondent's unlawful petition to compel individual arbitration in a collective action. Interest shall be computed as prescribed in *New Horizons*, 283 NLRB 1173 (1987), compounded daily as prescribed in *Kentucky River Medical Center*, 356 NLRB 6 (2010).

Upon the forgoing findings of fact and conclusions of law, and upon the entire record, I issue the following recommended.[9]

## ORDER

Respondent, Four Seasons Healthcare & Wellness Center, LP, a California Limited Partnership with an office and principal place of business in North Hollywood, California, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Maintaining a mandatory and binding arbitration agreement that require employees, as a condition of employment, to waive their right to pursue class or collective claims in all forums, whether arbitral or judicial.

(b) Maintaining a mandatory and binding Agreement and Policy that employees would reasonably believe bars or restricts employees' rights to file unfair labor practice charges with the National Labor Relations Board or to access the Board's processes.

(c) Filing a petition to enforce its Agreement and Policy to thereby compel individual arbitration and preclude employees from pursuing employment-related disputes with the Respondent on a class or collective basis in any forum.

(d) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Rescind the mandatory and binding Agreement and Policy in all of its forms, or revise them in all of its forms to make clear to employees that the Agreement and Policy do not constitute a waiver of their right to maintain employment-related joint, class, or collective actions in all forums, whether arbitral or judicial;

[8] Pursuant to the Board's *D.R. Horton* and *Murphy Oil* rulings, Respondent is free to oppose class certification on any basis *other* that an unlawful arbitration agreement compelling employees to arbitrate employment disputes on an individual basis. As the Board observed, employees have Sec. 7 rights to *seek* class actions, not to have such class actions approved.

[9] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

and that they do not restrict employees' right to file charges with the National Labor Relations Board or to access the Board's processes.

(b) Notify all current and former employees who were required to sign the Agreement and Policy in any form that they have been rescinded or revised and, if revised, provide them a copy of such documents.

(c) Within 14 days after service by the Region, notify the Superior Court of the State of California in Case No. BC588960 that it has rescinded or revised the mandatory Agreement and Policy upon which it based its motion to dismiss Ana Cruz' collective state action and to compel individual arbitration of her claim, and inform the court that it no longer opposes the action on the basis of the Agreement and Policy.

(d) In the manner set forth in this decision, reimburse Ana Cruz for any reasonable attorneys' fees and litigation expenses that she may have incurred in opposing Respondent's petition to dismiss her state court action in Case No. BC588960.

(e) Within 14 days after service by the Region, post at all its locations in California where notices to employees are customarily posted, copies of the attached notice, in English and Spanish, marked "Appendix."[10] Copies of the notice, on forms provided by the Regional Director for Region 31, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. In addition to physical posting of paper notices, the notices shall be distributed electronically, such as by email, posting on an intranet or an internet site, and/or other electronic means, if the Respondent customarily communicates with its employees by such means. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facilities involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since February 4, 2016.

(f) Within 21 days after service by the Region, file with the Regional Director for Region 31, a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

Dated, Washington, D.C. June 21, 2017

## APPENDIX

### NOTICE TO EMPLOYEES
### POSTED BY ORDER OF THE
### NATIONAL LABOR RELATIONS BOARD
### An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union

Choose representatives to bargain with us on your behalf

Act together with other employees for your benefit and protection

Choose not to engage in any of these protected activities.

WE WILL NOT maintain a mandatory and binding Agreement and Policy that our employees reasonably would believe bars or restricts their right to file charges with the National Labor Relations Board or to access the Board's processes.

WE WILL NOT maintain and/or enforce a mandatory Agreement and Policy that requires our employees, as a condition of employment, to waive the right to maintain class or collective actions in all forums, whether arbitral or judicial.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights listed above.

WE WILL rescind the mandatory and binding Agreement and Policy in all of its forms, or revise it in all of its forms to make clear that the Agreement and Policy does not constitute a waiver of your right to maintain employment-related joint, class, or collective actions in all forums; that it does not restrict your right to file charges with the National Labor Relations Board or to access the Board's processes; and does not prohibit you from discussing arbitrations with each other.

WE WILL notify all current and former employees who were required to sign the Agreement and Policy in all of its forms that the Agreement and Policy has been rescinded or revised and, if revised, provide them a copy of the revised documents.

WE WILL notify the court in which Ana Cruz filed her collective state claim that we have rescinded or revised the mandatory Agreement and Policy upon which we based our petition to dismiss her collective state claim and compel individual arbitration, and

WE WILL inform the court that we no longer oppose Ana Cruz's collective claim on the basis of that Agreement and Policy.

WE WILL reimburse Ana Cruz for any reasonable attorneys' fees and litigation expenses that he may have incurred in opposing our motion to dismiss her collective state claim and compel individual arbitration.

FOUR SEASONS HEALTHCARE & WELLNESS CENTER, LP, A CALIFORNIA LIMITED PARTNERSHIP

The Administrative Law Judge's decision can be found at www.nlrb.gov/case/31-CA-169143 or by using the QR code below. Alternatively, you can obtain a copy of the decision from the Executive Secretary, National Labor Relations Board, 1015 Half Street, S.E., Washington, D.C. 20570, or by calling (202) 273–1940.

[10] If this Order is enforced by a judgment of the United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."